Supreme Court of the United States

OCTOBER TERM, 1940.

No. 217

RALPH R. KELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

C. L. DAWSON,
Washington, D. C.,

FREDERIC H. MAUGHMER,
J. HARRY LATHAM,
Savannah, Missouri,

Attorneys for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellee below, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on April 9th, 1940.

Opinions Below.

Judge Otis of the District Court of the United States for the Western District of Missouri rendered an opinion fav-

orable to petitioner on the question of the statute of limitations herein involved (R. 8-9). The Opinion of the United States Circuit Court for the Eighth Circuit reversing Judge Otis is set forth in the record. (R. 288-294.)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 9th, 1940 (R. 292-293). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Act of January 28, 1935 (38 U. S. C. A. 445c) defining "disagreement" under Section 19 of the World War Veterans' Act also operates as a retroactive statute of limitations so as to bar by retroactive legislation a right to bring suit on a war risk insurance contract.

Statutes Involved.

The pertinent statutes are fully set forth in the brief.

Statement of Facts.

The petitioner filed this action on a war risk insurance contract in the District Court for the Western District of

Missouri. Three causes of action were stated, the first alleged a permanent and total disability of petitioner as of February 1, 1925, the second a permanent and total disability as of July 1, 1927, and the third a permanent and total disability as of May 1, 1929. (R. 6.) The complaint further alleged that the petitioner filed a claim for his insurance benefits with the Veterans' Administration on May 26, 1931 (R. 2) and that such claim was finally denied on May 4, 1938. Suit was filed 14 days after the denial on May 18th, 1938. (R. 7.) The answer sets forth that the claim for insurance benefits filed on May 26, 1931 was denied by the Insurance Claims Council of the Veterans' Administration on August 24, 1932 (R. 12) and that on October 25, 1935 the plaintiff through his attorney requested further reconsideration of the claim and the answer further alleges that this claim was denied by the Board of Veterans' Appeals on May 4, 1938 (R. 12).

The District Court overruled the plea of the statute of limitations. (Opinion R. 8-9.)

There was a trial and a jury verdict in favor of the petitioner. The jury found that the petitioner became permanently and totally disabled as of May 1, 1929. (R. 14.) Judgment was entered in petitioner's favor on April 18, 1939. (R. 15.)

From this judgment the United States appealed and assigned two errors. (R. 21.) First that the Court erred in overruling its motion to dismiss the suit on the ground that the action was barred by the statute of limitations, and second upon the ground that the Court should have granted its motion for a directed verdict at the close of all the testimony.

The Circuit Court considered only one question on appeal, that relating to the Statute of Limitations.

The Circuit Court held that a statute enacted on January 28, 1935 (38 U. S. C. A. 445c) defining "disagreement" under the World War Veterans' Act was an amendment to the Statute of Limitations and that it was to be applied retroactively from July 3, 1930, and by retroactive application the action of the petitioner was barred by the statute of limitations. The question arises whether the amendment of January 28, 1935 defining "disagreement" was an amendment of the statute of limitations, and if so, could such a statute bar a suit by retroactive application when no right to sue the government on the insurance contract in question could have arisen until the statute of January 28, 1935 was enacted. It is admitted that during the period from July 3, 1930 to January 28, 1935 no District Court of the United States had jurisdiction of petitioner's cause of action under the then existing laws providing for suits against the government on war risk insurance contracts.

Specification of Errors to be Urged.

The United States Circuit Court of Appeals erred in holding that the petitioner's cause of action was barred by the statute of limitations, and in holding that the Act of January 28, 1935 (38 U. S. C. A. 445c) defining disagreement was an amendment to the Statute of Limitations.

Reasons for Granting the Writ.

The petitioner asserts that a writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Court in

that the United States Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court, and second upon the ground that it has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and third upon the ground that it has so far departed from the accepted and usual course of judicial proceedings that it calls for the exercise of this Court's power of supervision; because the Circuit Court ignored the express language of the statute of limitations contained in Section 19 of the World War Veterans' Act (38 U. S. C. A. 445) and applied language relating to the definition of a "disagreement" under the Act to the statute of limitations.

Argument and Brief.

This suit is brought under the provisions of Section 19 of the World War Veterans' Act as amended July 3, 1930. (38 U. S. C. A. 445.)

This amendment provides in part as follows:

> In the event of disagreement as to claim, including claim for refund or premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall

have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the latter date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the ground that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No State or other statute of limitations shall be applicable to suits filed under this section. * * * and the term disagreement means a denial of the claim by the Director or some one acting in his behalf on an appeal to the Director. * * *

It is to be noted that this amendment provides that a claim for insurance must be denied by the Director upon

an Appeal to the Director before suit may be brought against the United States.

The Insurance Claims Council which denied the petitioner's claim on August 24, 1932 (R. 12) was an intermediate Board of the Veterans' Administration. Its decision did not constitute a denial by the Director upon an appeal to the Director. Such a denial did not create a disagreement under the Act of July 3, 1930.

After the Act of July 3, 1930 many hundreds of suits were brought on war risk insurance contracts after decisions by the Insurance Claims Council. In practically every instance, the government pleaded that the District Courts had no jurisdiction because the claimants had not obtained a denial of the claim by the Director upon an appeal to the Director.

In this situation, the case of Frederick v. United States was certified to this Court by the United States Circuit Court of Appeals for the Eighth Circuit.

The question certified was whether the Director of the Veterans' Administration could delegate his authority to finally deny claims for insurance so that suits could be brought on such claims in the District Courts, on such disagreements.

After the Frederick case was argued in this Court a motion for a stay was made until Congressional legislation could be enacted "defining disagreement." This legislation was enacted on January 28, 1935, and was as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That a denial of a claim for insurance by the

> Administrator of Veterans' Affairs or any employee or agency of the Veterans' Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purposes of section 19 of the World War Veterans' Act, 1924, as amended (U. S. C. Supp. VII, title 38, sec. 445). This resolution is made effective as of July 3, 1930, and shall apply to all suits now pending against the United States under the provisions of section 19 of the World War Veterans' Act, 1924, as amended, and any suit which has been dismissed solely on the ground that a denial as described in this resolution did not constitute a disagreement as defined by section 19 may be reinstated within three months from the date of enactment of this resolution.

It was made retroactive for the purpose of vesting jurisdiction in the District Courts of cases then pending where suits had been brought on war risk insurance contracts after denials by the Insurance Claims Council.

After this statute was enacted this Court reversed and remanded the case of Frederick v. United States for trial (294 U. S. 695, 79 L. Ed. 101).

It is this statute with which we are here concerned. The petitioner asserts that it is a statute defining a "disagreement." The respondent claims and actually convinced the Circuit Court below that it was a retroactive statute of limitations.

If there was any ambiguity in the language resort may be had to the reports of the World War Veterans' Committee which handled the amendment in question.

> Duplex Printing Company v. Deering, 65 L. Ed. 349, 254 U. S. 443.

The World War Veterans' Committee of the House of Representatives made its report on the amendment of January 28, 1935 defining "disagreement" on January 21, 1935. (74th Congress 1st Session Report No. 11.) The Committee said that the proposed amendment was for two purposes. The first purpose was to remove any doubt as to the definition of disagreement and the second purpose was to permit the reinstatement of any suit which has been dismissed solely on the ground that denial so described in the resolution did not constitute a disagreement under the provisions of Section 19 of the World War Veterans' Act. Nothing was said in the report of the Committee about modifying or amending the statute of limitations.

There has never been any amendment to the statute of limitations providing that when a claim for insurance was timely filed the statute was suspended until the denial of the claim by the Director.

The respondent successfully contended in the Circuit Court below that the Act of January 28, 1935, was an amendment to the statute of limitations, and that because Congress expressly made it retroactive, the statute of limitations in this case commenced to run from the date of the denial by the Insurance Claims Council on August 24, 1932.

In other words, the petitioner could not have brought a suit on the denial of the Insurance Claims Council because the District Court had no jurisdiction but nevertheless the respondent contends the statute of limitations was running during all of this period by retroactive application.

The petitioner asserts that the statute was suspended when he filed a claim for insurance on May 20, 1931 (R. 12)

until the claim was denied by the Director upon an appeal to the Director on May 4, 1938 (R. 12).

The permanent and total disability of the petitioner was claimed as of May 1, 1929. If no claim had been filed the six-year statute would have completely run on May 1, 1935.

The Act of July 3, 1930, (38 U. S. C. A. 445) providing a six-year statute of limitations provides specifically as follows:

> "Provided further that this limitation is suspended for the period elapsing between the filing in the Bureau of the claim sued upon and the *denial of the claim by the Director.*"

When petitioner filed his claim on May 20, 1931, the statute was suspended if as District Judge Otis said "If the statute is to be taken as it is written" (R. 9) until the claim was denied by the Director on May 4, 1938. The Board of Veterans' Appeals represent the Director.

In any event, the statute could not commence to run until January 28, 1935 when the denial of the Insurance Claims Council became for the first time a disagreement. Even this view requires judicial legislation.

However, if this view is taken the action filed on May 18, 1938 was seasonably begun.

Under this rule the statute of limitations commenced to run as of May 1, 1929, and it ran for two years and 19 days until a claim was filed with the Veterans' Administration. It remained in suspense until the denial by the Insurance Claims Council which became a disagreement on January

28, 1935. The statute then commenced to run again and ran until October 25, 1937, when the case was reopened. This is a period of two years and some nine months. It remained in suspense until the denial by the Board of Veterans' Appeals on May 4, 1938. The statute then commenced to run again and the petitioner had one year and approximately ten months after May 4, 1938 in which to timely file suit. He filed suit within fourteen days.

The above might be a reasonable interpretation of the statute of limitations but to assert that the Act of January 28, 1935 defining disagreement was a retroactive statute of limitations is not only untenable but also unthinkable when it is to be remembered that the amendment in question was handled by the World War Veterans' Committee of the House of Representatives composed wholly of World War Veterans.

It would be a brave man indeed who would appear before the World War Veterans' Committee and inform them that they sold their permanently and totally disabled comrades down the river by a retroactive statute of limitations. Certainly no one at all familiar with the legislative actions of the World War Veterans' Committee would ever make such an assertion in good faith.

In the case of Parker v. United States filed in the District Court of the United States for the Northern District of West Virginia, the District Court applied the January 28, 1935 amendment in question as a retroactive statute of limitations. This case is now pending on appeal in the United States Circuit Court of Appeals for the Fourth Circuit.

In the Parker case the plaintiff filed a claim for permanent and total disability benefits with the Veterans' Administration on October 30, 1930. His claim was denied by the Insurance Claims Council on April 29, 1932. He filed suit in the District Court on January 24, 1933, and this suit was voluntarily dismissed on in November, 1933 because of "no disagreement." Parker asked reconsideration of his claim in the Veterans' Administration on February 23, 1935, and the case was under consideration in the Veterans' Administration until April 4, 1936, when it was again denied. He filed suit on May 4, 1936. The government conceded that he had 246 days after a "denial" in which to file suit but contended that because of the Act of January 28, 1935 defining disagreement that the statute ran from April 29, 1932, the date of the decision by the Insurance Claims Council because the statute was an amendment to the statute of limitations and by retroactive application it ran regardless of whether any District Court had jurisdiction. It was therefore barred before January 28, 1935, even though he had no right to bring suit. The net result is that if the District Court in the Parker case is sustained that the plaintiff never had any rights under the statute of limitations enacted on July 3, 1930.

If this Court believes that this absurd and unwarranted construction of the January 28, 1935 amendment defining "disagreement" is just and proper then this petition for a writ of certiorari should be denied, but if on the other hand, as petitioner believes that the law of right and justice is still the prevailing rule in the Courts of this country then this petition for a writ of certiorari should be granted.

Attention of the Court is particularly directed to the fact that under the Act of July 3, 1930 providing for a statute of limitations this petitioner could not have filed a

suit after a denial by the Insurance Claims Council of his claim on August 24, 1932 because it was not a final denial, there was no disagreement. The decision of the Insurance Claims Council only became a disagreement by retroactive application of the Act of January 28, 1935, defining a disagreement.

The petitioner contends with great earnestness and frankness that the interpretation that the Act of January 28, 1935 defining "disagreement" is a retroactive statute of limitations is nothing more or less than judicial legislation.

The respondent will probably argue that unless the statute of limitations does commence to run from the date of a decision by an inferior tribunal that there may be an indefinite suspension of the statute.

The complete answer to that argument is the regulations promulgated by the Veterans' Administration. It was recognized that under the Act of July 3, 1930, defining disagreement as a "denial by the Director upon an appeal to the Director" that a veteran having timely filed his claim for insurance benefits was entitled to a "disagreement" upon which a suit could be brought in the District Courts of the United States.

Therefore on March 16, 1931 regulation 1000 was promulgated, the pertinent parts of which are as follows:

> A. Duties and Functions: The Insurance Claims Council is vested with exclusive authority to render *original* decisions on all claims for permanent and total disability for insurance, together with any other claims for such benefits that may be referred thereto by the Director. * * *

B. * * *

C. Where the Insurance Claims Council finds that total and permanent disability does not exist as alleged in the claim, appeal may be taken in the usual manner from such decision by the claimant, or his duly authorized representative, to the Administrator of Veterans' Affairs, provided such appeal is made within sixty days from the date of notification of such decision. * * * When no appeal is made by claimant or his duly authorized representative within said period of sixty days, the decision of the Insurance Claims Council and all other records pertaining thereto, including the case folder, shall be referred to the Administrator of Veterans' Affairs for his approval or disapproval of said decision. * * * (March 16, 1931.)

Under this regulation the Veterans' Administration assumed the burden of furnishing a claimant with a disagreement. The respondent will probably cite certain regulations issued on November 1, 1931 (3200-3204). These regulations were involved in the case of Frederick v. United States, *supra*. Reference of the Court is directed to the briefs filed by the United States in this Court in the Frederick case. The government in the Frederick case doubted the validity of these regulations. Yet they were cited in its brief in the Circuit Court below as valid and existing regulations. The only valid regulation of the Veterans' Administration in force until January 28, 1935 relating to this matter required the Insurance Claims Council to forward a claimant's file to the Administrator of Veterans' Affairs for his approval or disapproval of its decision. If this had been done the statute of limitations would have commenced to run from the date of the Administrator's action.

As was pointed out by the United States Court of Appeals for the District of Columbia in the war risk insurance case of Rosario v. United States, 106 Fed. (2) 844, the Veterans' Administration could at any time take final action on an insurance claim and thus commence the running of the statute. This Court denied a petition for certiorari filed by the government in the Rosario case, 84 L. Ed. 101.

If this petition for a writ of certiorari is granted a further and more extensive brief on the question at issue will be filed with this Court.

Conclusion.

WHEREFORE, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Circuit Court of Appeals for the Eighth Circuit and upon such a review the judgment of the Circuit Court of the Appeals for the Eighth Circuit be vacated, reversed and set aside, and that this case be remanded to that Court with instructions to proceed further in accordance with the views of this Court.

C. L. DAWSON,
FREDERIC H. MAUGHMER,
J. HARRY LATHAM,
Attorneys for the Petitioner.